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No. 08-184

Supreme Court, U.S.
FILED
SEP 30 2008
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

114 TENTH AVENUE ASSOC., INC.,

Petitioner,

v.

NYCTL 1999-1 TRUST and THE BANK OF NEW YORK as Collateral Agent and Custodian for the NYCTL 1991-1 TRUST, KAREN NASON, NEW YORK CITY DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT b/f NYC BHO, NEW YORK CITY BUREAU OF HIGHWAY OPERATIONS, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, NEW YORK CITY DEPARTMENT OF FINANCE and CARLTON CAPITAL CORP.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT

REPLY BRIEF

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STATEMENT PURSUANT TO RULE 29.6

Petitioner's corporate disclosure statement was set forth at page *iii* of its Petition for a Writ of Certiorari, and there are no amendments to that statement.

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INTRODUCTION

Respondents' Oppositions to the Petition are noteworthy for the points they ignore. First, they provide no real defense of the plain error committed by the Appellate Division in its core ruling that the Plaintiff Trust,[1] which was created by the City to securitize municipal tax liens, is a private actor for due process purposes. This error is significant in that affirming an improper classification will allow this Trust and similar NYCTL Trusts, as well as tax trusts to be established around the country, to avoid their state actor obligations not only in this case, but in all of their future activities.[2]

The Respondents conveniently disregard that 114 Tenth continued to pay its property taxes while the foreclosure was proceeding, the sort of "unique information" that should have been used as a clear indication that 114 Tenth was likely unaware that its Property was in foreclosure. Similarly, the Respondents ignore that the Trust simply failed to comply with the trial court's requirement that it serve an interlocutory order on 114 Tenth, something which would have notified the company that its property was being foreclosed. Moreover, even if this Court were to disregard the facts

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1. Unless otherwise specified, the defined terms used in this Reply shall have the same meanings as those in the Petition.

2. With the recent federal conservatorship of Freddie Mac and Fannie Mae and the ongoing formulation of a U.S. Treasury buyout of much of the mortgage industry, it may well become even more critical for this Court to offer guidance on how government instrumentalities shall provide due process in real estate foreclosures.

that the Respondents conveniently ignore, it should apply *Jones v. Flowers*, 547 U.S. 220 (2006) to disapprove tax lien foreclosures where the plaintiff knows the taxpayer's actual business address but chooses nevertheless to use, but not monitor, a service method with high risks of non-delivery.

Respondents protest that a method of providing notice other than BCL § 306(b) would be unworkable, ignoring that every other state but one prohibits such Substituted Secretary Service, at least before a good-faith attempt at a more direct method of service is attempted. Further, New York has a simple procedure which, though not required in tax foreclosures, would have remedied the due process deficiencies here: mailing the process to the last known address of the corporate defendant prior to obtaining a default judgment. Moreover, though New York has an inapplicable procedure which could have remedied the due process problems, the other elements of New York law that Respondents claim to mitigate these problems do not lessen the denial of 114 Tenth's due process rights.

I

RESPONDENTS' EFFORTS TO AVOID THE ISSUE OF THE APPELLATE DIVISION'S PLAIN AND SIGNIFICANT ERROR IN FINDING THE TRUST TO BE A PRIVATE ACTOR DEMONSTRATE THE NEED FOR CERTIORARI

Central to the decision of the Appellate Division below was its holding that *Jones* was inapplicable because "process was served by a private actor" not by the government. (App. A at 2a). Not disputing 114 Tenth's detailed analysis as to why the Trust is a governmental actor, Respondents seek to diminish the significance of this ruling. Carlton attempts to avoid the ruling entirely in its Opposition (at 8), conceding that "state action is presumed to be present." [3] The City Respondents attempt to dismiss the argument in the last paragraph of their Opposition (at 13) by claiming that the issue is an immaterial "red herring."

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3. Though it concedes the state action point, Carlton claims it to be "very much an open issue" based on its gross misreading of 2000 law journal article. The article explains that even truly private tax lien investors may be subject to governmental due process requirements, noting in a footnote that: "the essential elements [of state action] as established by the United States Supreme Court in *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478 (1988) appear to be present." Alexander, Frank S., *Tax Liens, Tax Sales & Due Process*, 75 Ind. L. J. 747, 764 & n.102 (2000). As the Petition makes clear, *Brentwood Academy v. Tenn. Secondary School Athletic Ass'n*, 531 U.S. 288, 295 (2001), decided after that article was written, definitively establishes that the Trust is a state actor.

However, the question of whether a municipally-established Trust securitizing $48 million in City tax liens (along with its sister NYCTL Trusts securitizing more than $1.6 billion in tax liens) is bound by the broad panoply of duties the Constitution imposes upon state actors is anything but a triviality. Indeed, the holding below that city-created tax lien trusts are private actors has created a huge loophole for municipalities around the country to jump through to avoid due process requirements. At the very least, the Appellate Division's decision inoculates the entire family of New York City securitized trusts against governmental actor obligations.

Respondents avoid the state actor question because they realize that the Appellate Division's holding is indefensible. Had the Appellate Division found the Trust to be a state actor, it would have had to undertake a due process analysis under *Jones* and vacate the default. As such, this Court should, at the very minimum, remand this case for further findings on whether the Trust, as a state actor, afforded 114 Tenth its Fourteenth Amendment due process rights. More properly, however, because this Court has a sufficient record to find that 114 Tenth was denied due process, it should grant certiorari on both questions and reverse the decision below.

II

CERTIORARI SHOULD BE GRANTED BECAUSE THE TRUST VIOLATED 114 TENTH'S FOURTEENTH AMENDMENT RIGHTS BY NOT GIVING SUFFICIENT NOTICE OF THE FORECLOSURE ACTION

A. In Seeking to Distinguish *Jones* Respondents Ignore the Unique Information that 114 Tenth Was Continuing to Pay Taxes and that the Trust Failed to Comply With a Trial Court Order for Additional Notice

Respondents contend that the Trust's obligation under *Jones* to consider "unique information" about the foreclosed taxpayer extends only to information that has happened to come to its actual attention, and that it has no further obligation to act as though it actually desired to inform 114 Tenth. 547 U.S. at 230. They argue the Trust will avoid any *Jones* due process obligations if it insulates itself by intentionally avoiding learning anything about the taxpayer whose property it is seeking to take. They claim that the Trust has successfully avoided learning any "unique information," so their strictly circumscribed reading of *Jones* means they need do nothing else. However, their arguments disregard that the Trust, as the City's alter ego, was charged with the knowledge of and obligated to consider that 114 Tenth continued to pay taxes, in obvious ignorance of the tax lien sale and foreclosure action.

When the City conveyed the tax liens to the Trust, it wrote the amount of the delinquencies off from its accounting records, so that taxpayers inquiring of the City about the taxes due on their properties would not be told of any the debts "sold" to the Trust. This created a distinct trap for the unwary because a taxpayer unsure of its tax debts would be misled about the total it owed it if it asked the City for its balance. 114 Tenth fell squarely into this trap when it asked for and paid its tax balance on February 10, 2003, and was not told of the outstanding amounts that had been transferred to the Trust. As a result, 114 Tenth was misled into the erroneous conclusion that had satisfied its tax debt and its Property would not be at risk of foreclosure.[4]

114 Tenth's tax payment shortly before this foreclosure was commenced, and its continuing payments thereafter, were clear indications that it was not disregarding its tax obligations or abandoning its Property for its tax debts. Such payments were "unique information about an intended recipient" that *Jones* required to be considered "regardless of whether a statutory scheme is reasonably calculated to provide

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4. 114 Tenth was admittedly inconsistent in paying its property taxes precisely when due, but it understood that it was inconsistent so its President would periodically visit the City's tax offices to obtain and pay the precise balance due that day. However, even inconsistent taxpayers, or worse, those who fail to pay taxes entirely such as the petitioner in *Jones*, are entitled to at least a fair opportunity to get notice of its tax foreclosure, particularly where their actual addresses are on file with the tax authorities.

notice in an ordinary case." 547 U.S. at 230.[5] As such, where a taxpayer continues to make tax payments which are accepted by the City, it should at the very least trigger a duty to investigate further whether the taxpayer has been given notice of the foreclosure, even if not *per se* invalidating the foreclosure as a whole. *See Citibank N.A. v. Joffe*, 265 A.D.2d 291, 696 N.Y.S.2d 190 (2d Dep't 1999) (reversing summary judgment on question of whether lender had waived right to foreclose by accepting payments). Because the Trust did nothing in the face of 114 Tenth's continuing tax payments, it violated the requirement of *Jones* to provide additional notice when it was presented with unique information suggesting non-receipt of notice by the taxpayer.

The Trust also failed to comply with the trial court's directive that it serve the Amended Order of Reference on 114 Tenth. Although the trial court did not explain why it required such service here, foreclosure courts routinely require service of interlocutory orders to provide even non-responsive property owners notice of the progress of their foreclosures actions. Had this order been mailed to 114 Tenth at its known address, it would received at least some pre-judgment notice that the foreclosure was proceeding against it. The Trust's failure to comply with this additional court-ordered notice reinforces that the Trust had no actual desire to

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5. Although 114 Tenth's tax payments were technically made to the City, the Trust is required to "stand in the same position as the city [as though] the tax liens had not been sold." NYC Code § 11-332(a). As such, the Trust must be charged with the knowledge the City had of 114 Tenth's tax payments. Respondents do not dispute that knowledge gained by the City must be imputed to the Trust.

inform 114 Tenth, but rather intended only to proceed without the inconvenience of having the taxpayer there to actually defend.

Moreover, even without additional unique information, *Jones* should be applied to require foreclosing governmental entities to actually monitor the methods of service they select to assure that service does not go awry in a readily predictable manner. This is particularly necessary where the foreclosing plaintiff knows the actual address the taxpayer uses for ordinary correspondence, but disregards it. *See Interior Distributors, Inc. v. Hartland Construction Co.*, 116 N.C.App. 627, 632, 449 S.E.2d 193, 195-96 (Ct. App. N.C. 1994) (where plaintiff knew defendant's address, "substitute service of process on the Secretary of State was ineffective and violated defendant's due process rights").

B. Nearly All States Find It Practical and Preferable to Attempt Personal Service before Substituted Secretary Service

Both Respondents argue that the idea of serving a corporation other than upon the Secretary of State under BCL § 306(b) as unworkable. While it is unquestionably more convenient to have a government office at which a stack of foreclosure summonses can simply be dropped off with no further service requirements, most jurisdictions are leery enough of the due process problems associated with such naked Secretary service to forbid it in the first instance. Fifteen States do not permit corporations to be served through governmental officials at all. Thirty-three other

States plus the District of Columbia only permit Substituted Secretary Service on domestic or registered foreign corporations after at least one prior attempt at personal service. That leaves only two States, New York and West Virginia, that permit domestic corporations like 114 Tenth to be served through the Secretary of State in the first instance.

Respondents' obvious preferences for simplicity notwithstanding, the overwhelming majority of jurisdictions have no problem requiring plaintiffs to do more than BCL § 306(b) requires. As just one example, Georgia law holds that "a plaintiff cannot substitute service upon the Secretary of State under that statute when the plaintiff has actual knowledge of the corporation's location." *TC Drywall & Plaster, Inc. v. Express Rentals, Inc.*, 287 Ga.App. 624, 625, 653 S.E.2d 70 (Ga.App. 2007) (rejecting attempt at service on obsolete address of registered agent filed with Secretary). Such service rules stand in stark contrast to New York, where substituted service *ab initio* is held valid irrespective of whether process physically reaches the corporate defendant and irrespective of whether other means more assured to deliver actual notice were readily and inexpensively available. *Micarelli v. Regal Apparel. Ltd.* 52 A.D.2d 524, 524, 381 N.Y.S.2d 511, 512 (1st Dept. 1976) (service valid even where Secretary never mailed process).

Carlton claims that 114 Tenth has failed to demonstrate that resort to BCL § 306(b) frequently, and often intentionally, results in non-service. As was more fully set forth in the Petition (at 21-25), this procedural fact is well-documented by New York case law and by

its leading civil procedure commentator. Indeed, the New York Legislature recognized and partially addressed the problem in 1990 when it amended the default judgment procedure to require, in most cases, an additional mailing of process to "the corporation at its last known address." *See* CPLR § 3215(g)(4) (Reply App.). However, 114 Tenth did not receive the benefit of such additional notice because the statute carves out an exception for defendants who have defaulted in "actions affecting title to real property." *See* CPLR § 3215(g)(4)(iii). As the Trust could have solved the due process problem by the simple and minimally burdensome step of mailing a copy of the process to 114 Tenth at its last known address (which was in fact already listed on the face of the Summons), Respondents' argument that the due process deficiencies of BCL § 306(b) cannot be remedied in any practical manner must be rejected.

C. New York Procedure Contains No Effective Measures To Avoid the Well-Recognized Deficiencies in BCL § 306(b) Service in Real Property Cases

Despite the well-recognized deficiencies in BCL § 306(b), Respondents ineffectually suggest that several particular elements of New York corporate and procedural law ameliorate those deficiencies.

Respondents suggest that all of their due process problems are solved because process was served on a statutory agent of 114 Tenth, the Secretary of State, and service on a corporation's agent automatically affords it due process (citing only New York cases).

Respondents, however, ignore the authority cited in the Petition (at 18-19) that a forced, statutory designation of a government official as an agent of a corporation does not render that official an actual agent. Unsurprisingly, courts outside New York reject the idea that Substituted Secretary Service provides due process regardless of delivery of notice to the corporation or one of its actual agents. *Howard v. Jenny's Country Kitchen, Inc.*, 223 F.R.D. 559, 564-65 (D.Kan. 2004) (due process denied when Corporation served through Secretary as agent and Secretary mailed process to incorrect address); *Froland v. Yamaha Motor Co.*, 296 F. Supp. 2d 1004, 1008 (D.Minn. 2003) (though Secretary was served as agent, no due process where Hague Convention prohibited Secretary from completing service by mail).

Respondents also suggest that there is no due process issue because 114 Tenth could have vacated its default as a party not personally served if 114 Tenth had asserted a meritorious defense, *see* CPLR § 317, something the Appellate Division found it had not done. (App. A at 2a). However, as this Court recognized in *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80, 85 (1988), where due process fails, it is improper to require a meritorious defense because the defendant has been deprived of the opportunity to have "worked out a settlement or paid the debt[, or] sell his property himself in order to raise funds rather than to suffer it to be sold at a constable's auction."[6]

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6. Indeed, recent headlines make it clear that governments should be promoting every opportunity to obtain settlements or payoffs of debts, to avoid the economic damage caused by forced foreclosure sales.

Finally, Respondents suggest that submitting to BCL § 306(b) service is an essential part of the bargain that a company makes with the state by incorporating, and that a corporation forfeits all of its due process rights to notice and makes service impossible when it fails to keep its notice address updated with the Secretary.[7] However, it is long-settled precedent of this Court that "corporations are persons within the meaning of the Fourteenth Amendment," *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 780 n. 15 (1978), and that a State may not "exact as a condition of the corporation's engaging in business within its limits that its rights secured to it by the Constitution of the United States may be infringed." *Hanover Fire Ins. Co. v. Carr*, 272 U.S. 494, 507 (1926). More significantly, in *Jones*, this Court rejected the idea that "failure to comply with a statutory obligation to keep [an] address updated forfeits [the] right to constitutionally sufficient notice." 537 U.S. at 232. Where a governmental tax foreclosure plaintiff has the taxpayer's address immediately before its face, *Jones* does not allow the plaintiff to slam its eyes shut to the fact that the taxpayer failed to receive notice because of an incorrect address on file with an otherwise unrelated agency.

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7. 48 other States do not make a having a current address on file central to whether a corporation receives notice of litigation because they either require plaintiffs to attempt personal service before resorting to Substituted Secretary Service or prohibit Substituted Secretary Service altogether.

CONCLUSION

For the foregoing reasons and the reasons set forth in the Petition, Petitioner 114 Tenth Avenue Assoc., Inc. respectfully requests that this Court grant a writ of certiorari to review the Appellate Division decision below.

Respectfully submitted,

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